

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----x  
4 UNITED STATES OF AMERICA,  
5 Plaintiff,

6 11 CR 623

7 versus United States Courthouse  
8 225 Cadman Plaza East  
9 Brooklyn, N.Y. 11201

10 AGRON HASBAJRAMI,

11 DEFENDANT.

12 -----x  
13 January 23, 2015  
14 10:15 a.m.

15 TRANSCRIPT OF ORAL ARGUMENT

16 Before: HON. JOHN GLEESON,  
17 DISTRICT COURT JUDGE

18 APPEARANCES

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39 United States District Court Eastern District of New York

## Oral Argument

1                   THE CLERK: Criminal cause for motion hearing,  
2 United States of America versus Agron Hasbajrami, docket  
3 number 11 CR 623.

4                   Counsel, please state your appearances for the  
5 record.

6                   (Official Albanian (Tosk) Interpreter present, Uk  
7 Lushi.)

8                   THE COURT: State and spell your name for the  
9 record.

10                  MR. DuCHARME: For the United States Seth DuCharme,  
11 Matthew Amatruda and Saritha Komatireddy.

12                  And this morning we're joined at counsel table by  
13 Joe Palmer and Danya Tia from the National Security Division  
14 of the Department of Justice.

15                  MR. BACHRACH: Your Honor, for the defendant Agron  
16 Hasbajrami, Michael Bachrach.

17                  Mr. Zissou and Mr. Dratel were unable to be here  
18 today. I apologize. Seated with me, I'll let them introduce  
19 themselves.

20                  MR. TOOMEY: Good morning, your Honor.

21                  Patrick Toomey from the ACLU. I'm here with my  
22 colleagues Alex Abdo and Jamel Jaffer.

23                  THE COURT: Good morning, everyone.

24                  Do you want to be heard in support of your motion?

25                  MR. BACHRACH: Your Honor, at its core, the

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1 suppression motion really comes down to the question of  
2 whether or not the U.S. can spy on U.S. persons within the  
3 United States without a warrant.

4 We believe the Fourth Amendment says no. We believe  
5 the FAA says no. And the parties have collectively devoted  
6 over 350 pages to this question so I don't pretend to believe  
7 it's an uncomplicated one.

8 Before I really get to the heart of the motion  
9 though, I feel I need to point something out, and that is that  
10 from the defense perspective, these motions or at least the  
11 second motion which is the as applied challenge to the  
12 statute, the defense position is that that motion is not fully  
13 briefed and cannot be fully briefed until defense counsel  
14 receives copies, even if it's within the confines of the  
15 Classified Information Procedures Act, but copies of the  
16 government's legal arguments with respect to their response to  
17 the second motion.

18 We understand there may be reasons for national  
19 security purposes that we can't see the actual FISA material,  
20 although we debate that, but we think at the very least, due  
21 process requires us to see those legal arguments so that we  
22 can effectively research and respond to them because right  
23 now, it's a complete vacuum and we have no idea what the  
24 government has said.

25 With respect to the motions themselves, your Honor,

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1 I think -- quite frankly, I think I briefed it as thoroughly  
2 as I think we can possibly can and I really would rather know  
3 if there is a particular area your Honor would like us to go  
4 into, otherwise, I'm actually quite comfortable resting on the  
5 briefs or turning to counsel for the amici if they have  
6 something to say or with respect to the suppression motion. I  
7 am going to assume for a moment that you want me to wait  
8 before discussing all the other motions.

9 If I'm wrong --

10 THE COURT: That's fine with me. If I have  
11 questions, I won't be bashful.

12 MR. BACHRACH: Thank you.

13 THE COURT: Gentlemen, do you want to be heard?

14 MR. TOOMEY: Yes, your Honor.

15 My name is Patrick Toomey from the ACLU.

16 Thank you, your Honor, for allowing us to  
17 participate in this morning's hearing.

18 As you know, we filed a brief addressing the  
19 constitutionality of the FISA Amendments Act, and with your  
20 permission, I'd like to address a few issues raised in the  
21 government's papers and, of course, entertain any questions  
22 that the Court may have.

23 The three issues that I would like to address are  
24 the feasibility of a warrant requirement, the applicable of  
25 the International Overhear Rule and the availability of a

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1 foreign intelligence exception.

2 The first issue, the feasibility of the warrant  
3 requirement. The government's position is that a warrant  
4 requirement would be unworkable.

5 It claims that to require a warrant for surveillance  
6 under the FAA would be to require a warrant any time the  
7 government engages in foreign surveillance targeted at a  
8 foreigner abroad. That is not true.

9 THE COURT: You know what, come on up here to this  
10 shelf.

11 MR. TOOMEY: Thank you, your Honor.

12 The government claims that to require a warrant for  
13 foreign surveillance targeted at individuals abroad would be  
14 to require a warrant any time on the off chance that the  
15 government's surveillance might sweep up the communications of  
16 an American.

17 The Fourth Amendment doesn't require that however.  
18 What the Fourth Amendment requires is at a minimum, the  
19 government do one of two things; take reasonable precautions  
20 to avoid intercepting the communications of Americans without  
21 a warrant or to obtain a warrant when it seeks to look at an  
22 American's communications that it has collected the course of  
23 that foreign intelligence surveillance.

24 That requirement is entirely workable and would not  
25 comprise the government's legitimate interests in gathering

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1 foreign intelligence. The warrant requirement is the Fourth  
2 Amendment's default rule, and in a sense, it's always  
3 burdensome for the government to obtain a warrant to collect  
4 information or to engage in a search.

5 The mere fact that it has to go through the judicial  
6 process to do so is not the type of burden that the Fourth  
7 Amendment excuses. And the Supreme Court recognizes as much  
8 in Keith when it addressed intelligence gathering in the  
9 domestic context. The proposal to incorporate a warrant  
10 requirement is not novel either. There have been proposals  
11 put forth by then Senator Obama in 2008 when the FISA  
12 Amendment Act was first adopted. There have been more recent  
13 proposals that would incorporate a warrant requirement from  
14 both the President's Review Group and in a bill passed by the  
15 House this past year.

16 These proposals show that there are various ways  
17 incorporating this requirement and that there are more  
18 reasonable alternatives available to the government in terms  
19 of protecting Americans' communications in the course of this  
20 surveillance.

21 On the second point, on the application of the  
22 Incidental Overhear Rule, that rule has never operated as an  
23 independent or a separate exception to the warrant  
24 requirement. In fact, the cases show that precisely the  
25 opposite is true.

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1                   In the cases that the government points to, the  
2 government had obtained a warrant to collect the  
3 communications at issue and that warrant served to protect not  
4 just the privacy interests of the person who was the subject  
5 of the warrant, but also the privacy interests of other  
6 parties who might be overheard. And cases like Donovan  
7 Yannotti stand for that proposition.

8                   Just as fundamentally, the practical consequence of  
9 the government's application and location of the Incidental  
10 Overhear Rule in this case would be to eliminate Americans'  
11 pricey interests in their international communications.

12                  It would mean that the government could target any  
13 foreigner or every foreigner for surveillance and on that  
14 basis collect every American's communications with those  
15 foreigners without obtaining a warrant.

16                  Similarly, the purpose of the surveillance that is  
17 at stake under the FISA Amendment Act, the programmatic purpose  
18 is to obtain the international communications of Americans.  
19 And the scope of the surveillance that is being undertaken  
20 pursuant to this statute bears that out. The government is  
21 monitoring at least 89,000 targets under the statute according  
22 to it's own transparency reports and according to both the  
23 Privacy and Civil Liberties Oversight Board and other reports,  
24 the amount of Americans' international communications being  
25 collected is considerable.

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1                   Under the third point, the applicability of the  
2 foreign intelligence exception, as we lay out in our briefs,  
3 we don't believe the government can satisfy that exception  
4 because the warrant requirement is not impracticable in this  
5 context and it has -- it can use a warrant to obtain the  
6 information that it needs, but even more fundamentally, if  
7 there is a foreign intelligence exception and that's something  
8 with which we strongly disagree, it is not broad enough to  
9 encompass the surveillance that the government is undertaking  
10 here.

11                  The cases that the government points to stand for  
12 the proposition that there is a foreign intelligence exception  
13 where the government -- it's an individualized finding that  
14 the target is an agent of a foreign power and that finding  
15 then personally certified by the president for the Attorney  
16 General.

17                  Even the Privacy and Civil Liberties Oversight Board  
18 in its report, Section 702, found that it was not clear that  
19 the exception that the government would carve out with respect  
20 to this statute met the standard put forth in any of the  
21 preceding cases.

22                  Finally, I would just like to emphasize that what  
23 this statute does is to allow the government, to give the  
24 government nearly unfettered access to the international  
25 communications of Americans, and the practical consequence of

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1 the government's arguments would be to eliminate Americans'  
2 privacy interests in their international communications at a  
3 time when global communications are becoming ever more common.

4 Thank you, your Honor.

5 If you have any questions.

6 THE COURT: Thank you Mr. Toomey.

7 MR. DuCHARME: May I approach as well, your Honor?

8 THE COURT: Yes.

9 MR. DuCHARME: Your Honor, it is quite correct that  
10 the briefing was extensive in this case. That is not to say  
11 however that the issues are extraordinarily complicated.

12 I think that there is general agreement, for  
13 example, that what is at issue here is a subset of information  
14 that is incidentally obtained under Section 702 and I think it  
15 bears focusing on the title of the Statute 702, which is  
16 Procedures for Targeting Certain Persons Outside the United  
17 States other than the United States persons.

18 We feel confident, your Honor, that the statute and  
19 the way that the government has effected executing that  
20 statute is lawful and is reasonable under the Fourth  
21 Amendment.

22 THE COURT: Excuse me.

23 If you turn off the mic, we won't be listening to  
24 you confer.

25 MR. TOOMEY: Sorry.

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1                   MR. DuCHARME: Your Honor, I don't think anyone  
2 disputes that it's okay and reasonable, I don't think anyway,  
3 for the U.S. government to target specific foreign persons in  
4 foreign countries for a foreign intelligence purpose.

5                   What I understand defense counsel and amici counsel  
6 to be saying is they are concerned with the handling of the  
7 incidental collection of U.S. persons that sometimes occurs  
8 when 702 is executed against foreign targets.

9                   More broadly in this case, what is at issue I think  
10 here is the integrity really of the process by which the  
11 government conducts its national security surveillance  
12 programs. It's of importance obviously to the United States  
13 national security interests. In this particular case, it's of  
14 course of great importance to the defendant.

15                  We extensively briefed the issue and provided  
16 your Honor with a number of exhibits, supplemental filings  
17 which are intended to make clear how that process actually  
18 takes place in the real world.

19                  THE COURT: Just don't talk.

20                  MR. BACHRACH: Your Honor, if I may.

21                  THE COURT: Is this the interpreter?

22                  MR. BACHRACH: Yes.

23                  THE COURT: I was led to believe by communications  
24 from you that there wasn't going to be interpretation.

25                  MR. BACHRACH: Only if Mr. Hasbajrami was having

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1 trouble understanding.

2 THE COURT: Okay.

3 Swear the interpreter.

4 (Albanian (Tosk) interpreter sworn, Uk Lushi.)

5 MR. DuCHARME: Sorry, your Honor.

6 To be clear, we want the defendant with respect to  
7 this case but we also want the Court and the American people  
8 to have confidence in the integrity of this process. We take  
9 very seriously, of course, our constitutional obligations with  
10 respect to the surveillance of U.S. persons.

11 What I think bears emphasizing is Section 702 does  
12 not permit the targeting or reverse targeting of U.S. persons.  
13 What happens occasionally is that when a foreign person is  
14 targeted, a U.S. person is a party to a communication with  
15 that person and that U.S. person's information is obtained in  
16 the course of the 702 collection. It's not the intent of the  
17 statute. There are mandated minimization in targeting  
18 procedures to limit the risk of inadvertently targeting a U.S.  
19 person. The Court knows what those procedures are. The law  
20 requires them. The government requires them. The government  
21 follows them. The FISC reviews them. Congress does oversight  
22 over them on a routine basis. So there are oversights in  
23 place.

24 In terms of the worry that every foreign person  
25 could be targeted under every facility that they might use,

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1 really I think distorts what the statute says and what  
2 hopefully the Court's understanding is of how the program  
3 works.

4 In this particular case, judge, I think it also  
5 bears focusing on the fact that this case is really important  
6 because it implicates an interplay between a number of  
7 different authorities.

8 The Title VII FISA authority where Section 702 is  
9 which is really what is front and center here but also  
10 traditional Title I and Title III FISAs which have been more  
11 frequently litigated, and the other investigative tools that  
12 are available to the United States government and law  
13 enforcement agencies when they learn, for example, that a  
14 person in the United States, in New York City for example, is  
15 communicating with someone overseas about matters related to  
16 terrorism. What did the United States government do in this  
17 case? What does the United States do as a general matter?  
18 And I hope that what we'll emerge from this litigation is a  
19 better understanding and a greater confidence in how those  
20 tools are used and not frankly abused.

21 We share in the concerns of the ACLU frankly and the  
22 defendant in this case that there must and should be proper  
23 limitations on government surveillance of U.S. persons. We  
24 want the Court and the defendant and the American people to  
25 have confidence that there are checks more broadly and that

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1 there were checks in this case and that the steps that we took  
2 were reasonable.

3 In fact, we think that this case stands really as a  
4 very good example of how these various legal authorities and  
5 tools should be used.

6 Respectfully, judge, I think when I read the statute  
7 and when I look at the cases that give us guidance on  
8 balancing our national security efforts against foreign  
9 persons with our need to protect the American people here at  
10 home, I really think this case stands as an example largely  
11 and clearly with respect to the notice issue, I am not saying  
12 we have done everything perfectly but when we are talking  
13 about reasonableness and good-faith and appropriateness and an  
14 understanding of what the law requires of us and where the  
15 boundaries should be and our obligations, I think this case  
16 frankly stands as an example of what we are supposed to do.

17 THE COURT: When you say notice issue, you mean the  
18 notice to Mr. Hasbajrami that he was subjected to 702  
19 surveillance?

20 MR. DuCHARME: That's correct, judge. That was an  
21 unfortunate mistake but when we realized we should have told  
22 him, we told him. And reasonable minds perhaps could differ  
23 as to what the appropriate remedy was for that late notice.  
24 Yours was you put him back in the position that he would have  
25 been had we given him the proper notice in the first place and

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1 that's where he now stands and given where we ended up, we  
2 welcome the challenges by the defendant and by amicus and we  
3 welcome the Court's scrutiny.

4 These are issues that frankly have not been  
5 addressed previously very often by the Court and we welcome  
6 the chance to allay some of the concerns raised by the  
7 defendant and we welcome the Court's scrutiny. We want people  
8 to have confidence in the integrity of our programs, the  
9 reasonableness of our programs and the constitutionality of  
10 our programs. These are obviously very sensitive and  
11 important issues.

12 I think --

13 THE COURT: Does it make a difference whether the  
14 communications at issue are specifically targeted  
15 communications or on the other hand, what are called -- this  
16 terminology is actually new to me, but upstream  
17 communications?

18 Do you understand my question?

19 MR. DUCHARME: I think so.

20 THE COURT: From a Fourth Amendment perspective,  
21 does it matter whether the incident or interception of a U.S.  
22 person pursuant to 702 surveillance was obtained in connection  
23 with a targeted, a targeted interception, specific  
24 communication devices, interception to/from as opposed to  
25 upstream?

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1                   Do you understand my question?

2                   MR. DuCHARME: I think I do, judge. And with your  
3 indulgence, I would like to give my colleague to also engage  
4 with the Court.

5                   Ms. Komatireddy is fully prepared and eager to  
6 address some of the Court's questions, and if that is okay  
7 with you, I would like to give her a chance to engage.

8                   MS. KOMATIREDDY: With respect to the two types of  
9 collection that you are referencing, both are actually under  
10 the statute what you would consider to involve targeting  
11 because the statute requires that surveillance only be  
12 conducted with the intention of targeting a non-U.S. person  
13 located abroad to obtain foreign intelligence information.  
14 And then the targeting procedures that are approved by the  
15 Court promulgated by the Attorney General submitted to the  
16 Court and approved by the FISC further delineate exactly how  
17 the intelligence community identifies those targets. So with  
18 respect to the two types of collection that you are  
19 referencing, whether there is collection that is coming  
20 directly from a service provider or from the  
21 telecommunications backbone, the upstream collection, the  
22 actual seizure of communications results from targeting of a  
23 non-U.S. person.

24                   THE COURT: I understand that. So it sounds like  
25 the answer to my question you say is no, it doesn't matter.

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1 MS. KOMATIREDDY: Between the programs?

2 THE COURT: Is the likelihood of incidental  
3 interception of a U.S. person different in those two contexts?

4 MS. KOMATIREDDY: I can't speak to the precise  
5 likelihood. What I can say with respect to both of the  
6 programs, we have in addition to the targeting procedures,  
7 minimization procedures that are also submitted to the FISC  
8 with respect to both programs, and as the Court is aware from  
9 Judge Bates' opinion, those procedures have at times been  
10 approved, at times have not been approved and have been  
11 modified.

12 So with respect to both, there are safeguards in  
13 place to insure that any incidental collection of U.S.  
14 persons' communications is minimized as much as possible.

15 THE COURT: What is your response to your  
16 adversary's claim that unless he sees all of your legal  
17 argument, he can't adequately argue in support of this motion?

18 MS. KOMATIREDDY: Your Honor, it's certainly in  
19 everyone's interest for defense to see as much of the legal  
20 argument as possible. To the extent we redacted our brief,  
21 it's because the law requires it. In this context, Congress  
22 has set forth a very specific procedure for how to handle  
23 classified information. And Section 1806 F sets out that  
24 procedure and specifically contemplates ex parte briefing in  
25 the context of a suppression motion.

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1                   And as Judge Posner recently affirmed in his opinion  
2 in Dowd in the Seventh Circuit, that procedure specifically  
3 states that when the Attorney General declares the disclosure  
4 of certain information to pose harm to national security, then  
5 the next step is for the Court to review *ex parte* and in  
6 camera that information and make a determination as to the  
7 legality of the acquisition. Only if it's not capable of  
8 making that determination on its own is disclosure deemed  
9 necessary under the statute and is disclosure permitted.

10                  We would respectfully submit that given all the  
11 information that has been submitted in the classified form and  
12 unclassified form, and the Court knows the content, without  
13 commenting on exactly what was redacted, we would submit that  
14 the material that was redacted was redacted for a legitimate  
15 purpose and is covered by the declaration that was submitted  
16 as to why disclosure of the material would pose harm and that  
17 material taken as a whole gives the Court enough information,  
18 full information to determine the legality of the acquisition  
19 without disclosure.

20                  THE COURT: Anything further from the government?

21                  MR. DuCHARME: No, your Honor.

22                  MS. KOMATIREDDY: No, your Honor.

23                  THE COURT: Do you want to be heard with regard to  
24 this aspect of your motions and then I'll hear you on the  
25 other motions?

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1                   MR. BACHRACH: Yes, your Honor.

2                   May I approach?

3                   THE COURT: Yes.

4                   MR. BACHRACH: I'm going to work backward a little  
5 bit, your Honor.

6                   With respect to the last point that your Honor  
7 raised with respect to whether or not we should be entitled to  
8 this information, let me make one thing clear. We two  
9 competing statutes here. We have FISA but we also have CIPA.  
10 And FISA came first and was originally contemplated to not  
11 allow defense counsel to be part of the equation unless the  
12 Court absolutely thought it was necessary. But then just a  
13 few years later, Congress created a new statute, CIPA, for the  
14 very purpose of getting defense counsel who have the necessary  
15 security clearance involved in the process.

16                   Now, the two statutes have never really been  
17 rectified. They have been at odds, however, here there is no  
18 question that the relevant national security agencies made the  
19 determination at the very beginning of this case that both  
20 myself and Mr. Zissou, the two attorneys of record on this  
21 case, were not a security risk and because we were not a  
22 security risk, they gave us the relevant clearance, the  
23 relevant national security clearance to be able to see  
24 material related to this case, at the very least, to be able  
25 to see the arguments related to this case so that due process

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1 can be supported.

2                   In fact, under CIPA, your Honor, when the government  
3 refuses to turn over material that is classified and refuses  
4 to turn it over even to cleared counsel, this Court has the  
5 authority to give the government a choice; turn over the  
6 material or dismiss the entire case. That's within  
7 your Honor's power under CIPA.

8                   Now, I acknowledge that that is an extreme sanction  
9 and I'm not asking for it here. I'm simply asking to be able  
10 to see the material. But the point being, your Honor, the NSA  
11 has made one determination, that we are cleared, we are not a  
12 security risk, and the government has written in their brief  
13 and appears to be arguing still to this day that now for  
14 prosecutorial purposes, they take a different position. And  
15 respectfully, your Honor, we really believe that that can't  
16 stand.

17                  With respect to the government's argument with  
18 respect to whether or not the material, whether or not the  
19 intercepts of these communications were incident, there are a  
20 few problems with the government's argument.

21                  First of all, every case discussing the incidental  
22 overhear doctrine discusses it in the specter or in the  
23 auspices of a warrant. So what we are dealing with in all of  
24 those cases is there has been a warrant approved by a judge  
25 upon probable cause and during the execution of that probable

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1 cause warrant, accidentally a little bit of material, a little  
2 bit of intercepts were intercepted, not wide-scale programmatic  
3 intercepts that we have in this case.

4 In this case, we have surveillance programs that  
5 have been authorized by Congress but are not subject to a  
6 judge first approving a specific warrant. It doesn't include  
7 a determination of probable cause for the specific target or  
8 for Mr. Hasbajrami. It does not include any particularity  
9 regarding the place, time, person or thing that can be  
10 searched. And again, of course, all of it is issued by a  
11 judge.

12 The only thing that the FISA Court does in relation  
13 to the surveillance is approve whether or not the procedures  
14 at use are compliant with the statute, not whether or not the  
15 targets are appropriately being surveilled or intercepted  
16 incidentally, which again, we don't believe can be incidental  
17 when the government is fully aware that the way it is  
18 conducting its surveillance program, it is intended to capture  
19 not simply the recordings of a target abroad who is a foreign  
20 national, but an individual on U.S. soil or actually many  
21 individuals on U.S. soil who are either U.S citizens or  
22 permanent lawful residents, U.S. persons as they are both  
23 collectively defined under the statute and under the case law.  
24 It is completely different, your Honor.

25 The particular case that the government relies upon

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1 in its briefs to say that that particular targeting period --  
2 that these procedures were appropriate, that they have these  
3 protections and these mechanisms, the case they refer to is In  
4 Re Directives.

5 In Re Directives covered the same time period or at  
6 least part of the same time period as the intercepts in this  
7 case and in In Re Directives, the Court concluded the FAA  
8 itself wasn't even being followed properly and then the Court  
9 had to say no, you have to do it differently.

10 I'm not privy to whether or not the material they  
11 are using against Mr. Hasbajrami was collected before or after  
12 the procedures were corrected. All I know is that during that  
13 time period, the FISA Court of review determined that the FAA  
14 and its programs were not even following even the FAA's own  
15 statute, let alone whether or not it's constitutional.

16 And again, the Constitution is clear, you need a  
17 warrant; you need probable cause; you need a judge with a  
18 specific case in controversy examining whether or not it's  
19 appropriate to issue a warrant in this case, not just some  
20 broad, very broad shot in the dark.

21 If I may beg your indulgence, your Honor, for a  
22 second, an analogy. There is a movie and a book right now  
23 that is very popular. It's called American Sniper. And I  
24 think a sniper is a good analogy to the FAA program.

25 A sniper targets a very specific target who is

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1 supposed to be a foreigner or an enemy of the state. The FAA  
2 ostensibly targets, if it's working properly, a noncitizen  
3 abroad. But the way the FAA does it is instead of using a  
4 sniper's rifle, it uses a machine gun. Instead of using a  
5 scope, it puts on a blindfold. And instead of targeting  
6 foreign persons abroad, it turns around with the machine gun  
7 and just sprays across at anything it can hit on U.S. soil.

8 That is not constitutional, your Honor. That is not  
9 consistent with the Fourth Amendment. And it's certainly not  
10 consistent with when the defendant individually specifically  
11 in this case is a U.S. person who at all times relevant to  
12 this case is on U.S. soil.

13 Lastly, your Honor, *United States versus Verdugo*,  
14 which the government also cites, shouldn't be lost on  
15 your Honor.

16 The *Verdugo* case talks about the fact that when a  
17 foreigner is targeted abroad, it is constitutional to  
18 surveillance them. But in *Verdugo*, the entire surveillance  
19 was occurring abroad and that was what made it constitutional,  
20 the fact that it was a noncitizen and it was occurring abroad.

21 Here, your Honor, we have surveillance and just  
22 about I think all of both upstream and to/from surveillance,  
23 the actual intercepts are occurring on U.S. soil and then  
24 specifically in this case of a U.S. person.

25 So even under *Verdugo*, the Fourth Amendment says

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1 this cannot stand.

2 I'll defer now to amicus counsel.

3 THE COURT: All right.

4 Thank you.

5 MR. TOOMEY: Thank you.

6 The government tried to convey the impression that  
7 the incidental collection of Americans' communications under  
8 the statute is a *de minimis* consequence of any type of  
9 surveillance but that is not the case. The collection at  
10 issue under 702 as much as the government attempts to describe  
11 it as targeted at foreigners located abroad might equally be  
12 labeled as targeted at Americans' international communication.

13 One of the programmatic purposes of the law was to  
14 collect those communications and the government does so in  
15 great quantity under the statute.

16 The Fourth Amendment does not contain the word  
17 target but what matters under the Fourth Amendment is whether  
18 the surveillance or the search invades an American's  
19 reasonable expectation of privacy and the government at least  
20 nominally in this case does not disagree with that  
21 proposition, that Americans have a recognized privacy interest  
22 in their international communications.

23 The scope of the incidental collection in this case  
24 and the invasion of privacy goes directly to the  
25 reasonableness question that is before the Court. And the

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1 reasonableness of these procedures and the statute as a whole  
2 is not borne out by the facts as to the surveillance that the  
3 government points to. The statute permits collection without  
4 prior judicial review without a finding of probable cause and  
5 without any type of particularity. It leaves an immense  
6 amount of discretion in the hands of lower level executive  
7 branch officials and that is proven even more by the targeting  
8 and minimization procedures.

9 One might think that if the surveillance was  
10 targeted simply at foreigners located abroad, that the  
11 government would undertake reasonable efforts to exclude the  
12 communications of Americans when it collects them in the  
13 course of a surveillance.

14 There is nothing like that in the targeting  
15 procedures for the statute. Equally, one might think that if  
16 the government were seeking to protect the privacy of  
17 Americans' communications, the minimization procedures would  
18 require the government to go through the communications and  
19 sift out or segregate Americans' international communications.  
20 That is not the case.

21 What in fact the minimization procedures allow is  
22 the government in most cases to retain Americans'  
23 communications for up to five years and in the course of a  
24 dozen exceptions to keep those communications indefinitely.  
25 The procedures also allow the government to dip into this pool

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1 of incidentally collected communications and search using the  
2 names or identifiers associated with U.S. persons for  
3 information about those Americans in the course of ordinary  
4 criminal investigations.

5 The Privacy and Civil Liberties Oversight Board  
6 reported that the FBI does so routinely even at the assessment  
7 stage of national security investigations and that it also  
8 does so in the course of some ordinary criminal  
9 investigations.

10 What that does is convert a pool of data that the  
11 government says was acquired to target foreigners abroad for  
12 foreign intelligence purposes into an every day law  
13 enforcement tool for the FBI. And our position is that the  
14 procedures that currently exist don't satisfy the  
15 reasonableness requirement and instead, a warrant should be  
16 required when the government wants to access that information  
17 at the back end or in order to acquire Americans'  
18 communications at the front end.

19 Finally, just on your question about the upstream  
20 surveillance, your Honor, upstream surveillance raising a host  
21 of different legal problems separate from the prison program  
22 that is described in the papers. And you can see some of  
23 those other problems in both Judge Bates' opinion from 2011  
24 which I believe is the opinion that defense counsel was  
25 referring to, In Re Directives, and you can also -- those

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1 problems with upstream in the course of which the government  
2 seizes entire streams of internet traffic as it flows across  
3 networks not just the targets but many, many individuals who  
4 have no relationship to the government's target and may be  
5 communicating internationally or may be communicating  
6 domestically.

7 The set of additional legal problems associated with  
8 that program is spelled out even more clearly in the Jewel  
9 brief that is referenced in footnote 22 of the amicus filing.

10 If the Court has no other questions, thank you.

11 THE COURT: Thank you, Mr. Toomey.

12 Do you have other motions you want to address  
13 orally?

14 MR. BACHRACH: Briefly. If I may stand up?

15 THE COURT: Yes.

16 MR. BACHRACH: Very briefly touching on our motion  
17 to suppress based upon outrageous government conduct. Just to  
18 be very clear, our position on that case, if it wasn't already  
19 clear, is that the government's violation of its notice  
20 provisions simply returning both us and the government to  
21 where it would be had they not violated the statute is  
22 insufficient here because although it does allow us to be --  
23 the defendant to be able to challenge the constitutionality of  
24 the searches, it's really not a sanction in any way to the  
25 government because this was something they should have done to

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1 begin with. And since this Court has already ruled that this  
2 was an intentional DOJ-wide policy, we believe a stronger  
3 statement than simply giving them a second chance is  
4 appropriate in this case.

5 THE COURT: That I should dismiss the indictment?

6 MR. BACHRACH: No, not that you should dismiss the  
7 indictment, that you should suppress the results of the FAA  
8 surveillance.

9 We recognize that --

10 THE COURT: Even if it's consistent with the Fourth  
11 Amendment?

12 MR. BACHRACH: Yes, your Honor. Yes, your Honor.  
13 To prevent the government from in the future failing to give  
14 the defendant notice so that they can properly litigation this  
15 section. There are two motions here. We have a per se  
16 challenge under the Fourth Amendment but there is also an as  
17 applied challenge. So that assumes that the statute is  
18 generally speaking constitutional but then whether or not it  
19 is here, and that's where a sanction of suppression, even if  
20 it's constitutional, would have an appropriate effect.

21 On the other motions, obviously, your Honor, a lot  
22 of these are fruit of the poisonous tree. They sort of  
23 trickle out of the others. The post-arrest statements would  
24 only come into effect, and we acknowledge this, if we win one  
25 of the first three motions.

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1                   The discovery, I don't mean to relitigate. We have  
2 already spent a whole hearing on it previously and I discussed  
3 briefly why we think here it's additionally appropriate at  
4 least with respect to their brief and their arguments with  
5 respect to this brief.

6                   The one of the final ones that I did want to address  
7 though is a request that the government provide early  
8 disclosure of its expert notice and of its Brady, Giglio  
9 evidence, really Giglio evidence since obviously the  
10 government has an obligation to turn over Brady as soon as  
11 they recognize it.

12                  This is a particularly complicated case and  
13 particularly sensitive.

14                  How do I put this? Based upon -- I'm being careful  
15 because of CIPA. Depending who the government chooses to use  
16 in their case I know will impact whether or not the defense  
17 needs to file additional CIPA motions. And it's for that  
18 reason that we ask that whatever the witnesses are going to be  
19 in this case, be them lay witnesses or expert witnesses, we  
20 learn that well in advance of the trial date so that if as I  
21 expect these issues, classified issues to arise, we can  
22 effectively litigate it in a proper manner so that it doesn't  
23 delay the trial in any way.

24                  All of our motions with respect to early discovery  
25 of notice, even if it's under 404(b), it's all about we don't

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1 want to delay the trial, we want to make sure we can proceed  
2 as quickly as possible assuming there is a trial, and we  
3 believe particularly here, it's going to be complicated and  
4 it's going to involve classified information, the earlier we  
5 get it, the better chance we have of avoiding unnecessary  
6 delays.

7 Thank you.

8 MR. DuCHARME: Very briefly.

9 I guess on the last matter first. It is certainly  
10 our intent for things to proceed smoothly towards trial. I  
11 will speak to Mr. Bachrach after today's proceeding and try to  
12 figure out what his CIPA concern is.

13 If we determine that there is some CIPA issue  
14 coming, we will get it in front of the Court right away so it  
15 shouldn't be a last minute problem. I think that we can  
16 probably sort that out between ourselves. If not, we'll take  
17 the Court's assistance as always but I think that maybe we  
18 can. We don't have any secret witnesses in this case, so I  
19 think that we can sort that out.

20 In terms of the characterization of the Court's  
21 finding on this notice issue and specter of outrageous  
22 government conduct, it's not my understanding that the Court  
23 found that there was intentional misconduct by the Department  
24 of Justice with respect to the notice issue.

25 I think the record is clear, I hope it is, that we

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1 gave the notice we thought we were supposed to give at the  
2 time and when we realized we should have given different  
3 notice, we didn't, and I hope that cuts against the notion of  
4 outrageous government misconduct with respect to the notice  
5 issue or even intentional withholding of the notice.

6 So I just wanted to say that. I think that is  
7 really the only thing I need to say in response.

8 THE COURT: Remind me where we are on the CIPA  
9 track? We have, our CIPA Section 4 motion was due and filed  
10 January 9, I believe so that is pending before your Honor.  
11 There was previously some classified information that we had  
12 turned over to defense counsel prior to the plea. Some of  
13 those issues are implicated by the CIPA motion in that regard.  
14 There are some other issues as well and we are essentially  
15 waiting for the decision on that motion.

16 MR. BACHRACH: Just to supplement that.

17 Much more recently, actually during the pendency of  
18 this litigation while we were drafting the briefs,  
19 considerable more classified information has been disclosed to  
20 the defense.

21 We have not fully been able to look through it all  
22 yet but we have received it recently. So there is more there  
23 and I don't know yet if it's going to be litigated.

24 I know the original pretrial disclosure is something  
25 that we would want to make public.

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1                   THE COURT: The motion for relief based on  
2                   outrageous governmental misconduct is denied.

3                   The rest of these motions, I'll take under  
4                   advisement.

5                   Thank you.

6                   MR. DuCHARME: Thank you, your Honor.

7                   (Matter concluded.)

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